

FILED

AUG 14 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OLIVERIO MARTINEZ,

Plaintiff - Appellee,

v.

OXNARD POLICE DEPT.,

Defendant,

and

BEN CHAVEZ,

Defendant - Appellant.

No. 05-56129

D.C. No. CV-98-09313-FMC

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Florence Marie Cooper, District Judge, Presiding

Submitted August 10, 2006^{**}

Before: WARDLAW, PAEZ, and TALLMAN, Circuit Judges.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appellant Ben Chavez asks this Court to revisit its prior decision to deny his claim for qualified immunity. We do not have jurisdiction to consider Chavez's argument that the district court's factual findings were not supported by the evidence presented. *See Johnson v. Jones*, 515 U.S. 304, 319-20 (1995) (stating "that a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial").

Chavez advances the same arguments for qualified immunity as he did in his original appeal. *See Martinez v. City of Oxnard*, 337 F.3d 1091 (9th Cir. 2003), *on remand from Chavez v. Martinez*, 538 U.S. 760 (2003) (plurality opinion).

Because this Court's prior decision was not clearly erroneous, or undermined by intervening Supreme Court authority, we decline to exercise our discretion to depart from the law of the case doctrine. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997). Therefore, this appeal is controlled by our prior decision following remand in *Martinez*, 337 F.3d 1091.

Because Chavez's "arguments are wholly without merit" and serve no purpose but delay, this appeal is frivolous. *Adriana Intern. Corp. v. Thoeren*, 913 F.2d 1406, 1417 (9th Cir. 1990). We exercise our discretion under Federal Rule of Appellate Procedure 38 to grant Appellee's Motion for Sanctions and refer the

matter to the Appellate Commissioner for determination of what sanctions are appropriate.

DISMISSED in part; AFFIRMED in part; motion for sanctions GRANTED.